Supreme Court, U.S.
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No. 09-272

IN THE

Supreme Court of the United States

ATHENS DISPOSAL COMPANY, INC.
dba ATHENS SERVICES,

Petitioner,

v.

EDIXON FRANCO,

Respondent.

On Petition for a Writ of Certiorari to the
Court of Appeal of the State of California,
Second Appellate District, Division One

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Federal Arbitration Act (FAA) provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." Class-action bans—contract provisions that deny the right to pursue classwide relief, whether through litigation or arbitration—may be held invalid in some circumstances under generally applicable state contract law. Is such state law preempted by the FAA when the class-action ban to which it is applied is embedded in an arbitration agreement?

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INTRODUCTION

Athens Disposal Company asks this Court to review an intermediate state-court ruling that rests entirely on state contract law, and that does not even discuss the federal question presented in the petition. The question, in any event, is one on which the state and federal appellate courts are in unanimous agreement. Every state court of last resort and every federal appeals court to confront the question has reached the same conclusion—that the Federal Arbitration Act (FAA) does not preclude courts from assessing whether particular class-action bans are invalid under generally applicable state contract law. This Court has repeatedly denied petitions on the same question in recent years, and it should do the same here.

Despite the courts' unanimity on the question presented, Athens stretches to create the appearance of a conflict by citing cases that do not address FAA preemption of state law at all. Instead, Athens relies on cases addressing the very different question of whether a class-action ban may in some circumstances be incompatible with the remedial policies of a particular federal statute. Even on that question, which is not presented here, there is no conflict among the courts.

Finally, wholly apart from the lack of a conflict, certiorari is unwarranted because this case is a bad vehicle—particularly because Athens has not adequately demonstrated that this Court would even have jurisdiction over the case—and because Athens' FAA preemption theory is wrong on the merits.

STATEMENT

1. Petitioner Athens Disposal Company is in the business of collecting, hauling, and recycling trash. Re-

spondent Edixon Franco was employed by Athens as a truck driver. Franco sued Athens in 2007, alleging that the company had engaged in illegal payroll practices, including failing to provide employees with the meal and rest periods required by the California Labor Code. Because the alleged violations were systematic and widespread, the suit was brought as a class action. As authorized by California's Labor Code Private Attorneys General Act of 2004 (PAGA), the complaint also sought civil penalties for violations concerning both Franco and other current and former Athens employees.

Athens responded to Franco's complaint by seeking to compel arbitration. Its petition invoked a clause in the company's standard employee arbitration agreement providing that Athens and its employees "forgo and waive any right to join or consolidate claims in arbitration with others or to make claims in arbitration as a representative or as a member of a class or in a private attorney general capacity." The trial court granted Athens' petition and ordered the parties to arbitration. Pet. App. 43a-48a.

2. The California Court of Appeal for the Second District, Division One, reversed. Pet. App. 1a-42a. The court decided the case solely on the basis of state law. First, the court held that Athens' class-action ban, with respect to the alleged violations of the meal and rest-period laws, was invalid under generally applicable state law in light of "the modest size of the potential individual recovery, the potential for retaliation against members of the class, [and] the fact that absent members of the class may be ill informed about their rights." *Gentry v. Superior Court*, 165 P.3d 556, 568 (Cal. 2007), *cert. denied*, 128 S.Ct. 1743 (2008). Second, the court identified an independent state-law defect with the arbitration agreement: Because the

agreement would have precluded Franco from acting as a private attorney general under the PAGA (by seeking civil penalties for violations concerning other employees), the agreement impermissibly interfered with comprehensive enforcement of the statute. Accordingly, the court held that Athens' petition to compel arbitration should be denied and the case should proceed in a court of law.

The California Supreme Court denied Athens' petition for review without opinion. Pet. App. 49a.

REASONS FOR DENYING THE PETITION

Under the FAA, arbitration agreements are valid and enforceable "save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). This Court has consistently read that savings clause to mean that "generally applicable contract defenses such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). So long as the application of a state-law contract defense does not discriminate against arbitration, that application does not run afoul of the FAA. *Id.*

The sole question presented in Athens' petition is whether the FAA preempts the application of state contract law to invalidate a class-action ban embedded in an arbitration clause. Class-action bans are contract provisions that foreclose the right to seek classwide relief, whether through class-action litigation or classwide arbitration. Under the contract law of many states, such provisions may be held invalid under circumstances where the inability to seek any form of classwide relief effectively exculpates the drafter from potential liability for

individually small claims involving widespread practices. *See Discover Bank v. Superior Court*, 113 P.3d 1110, 1113 (Cal. 2005). State law in this regard applies equally to bans of class-action litigation in contracts without arbitration clauses as it does to bans of class arbitration in contracts with such clauses. *Id.*; *see, e.g., Dix v. ICT Group, Inc.*, 161 P.3d 1016 (Wash. 2007).

I. THERE IS NO CONFLICT OVER THE QUESTION PRESENTED.

Every state court of last resort and every federal circuit to have decided the question has reached the same conclusion: The FAA does not preclude courts from assessing whether particular class-action bans are invalid under generally applicable state contract law.

To date, at least nine state high courts have reached that conclusion. *See Feeney v. Dell Inc.*, 908 N.E.2d 753, 762-68 (Mass. 2009); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1222 (N.M. 2008); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1008-09 (Wash. 2007); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 260-63 (Ill. 2006); *Muhammad v. County Bank of Rehoboth, Del.*, 912 A.2d 88, 94-96 (N.J. 2006), *cert denied*, 127 S. Ct. 2032 (2007); *Discover Bank v. Superior Court of Los Angeles*, 113 P.3d 1100, 1110-17 (Cal. 2005); *Leonard v. Terminix Int'l Co., L.P.*, 854 So. 2d 529, 535-36 (Ala. 2002); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 272 n.3 (W. Va. 2002).

The federal circuits that have decided the question presented have come to the same conclusion. The Third, Ninth, and Eleventh Circuits have all issued decisions finding particular class bans invalid under state law and concluding that the FAA does not preempt those rulings.

See, e.g., Laster v. AT & T Mobility LLC, 584 F.3d 849, 857-59 (9th Cir. 2009) (California law); *Homa v. Am. Express Co.*, 558 F.3d 225, 231 (3d Cir. 2009) (New Jersey law); *Lowden v. T-Mobile USA*, 512 F.3d 1213, 1219-22 (9th Cir. 2008) (Washington law), *cert. denied*, 129 S.Ct. 45 (2008); *Schroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 987-93 (9th Cir. 2007) (California law); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1219 (11th Cir. 2007) (Georgia law). These holdings are also consistent with two earlier Ninth Circuit decisions predicting California law prior to the California Supreme Court's decision in *Discover Bank*.[1]

In the absence of any contrary cases adopting its theory that the FAA precludes courts from holding class bans in arbitration agreements invalid under state law, Athens looks even further afield in an attempt to create a conflict. The petition (at 20-24) conflates two distinct legal issues—whether the FAA preempts rulings concerning the enforceability of class action bans under generally applicable state law, on the one hand, and whether a particular class-action ban conflicts with a federal remedial statute, on the other hand.

Most of the cases that Athens cites do not involve state-law unconscionability challenges at all, let alone the issue of federal preemption of state law. Instead, the cited cases decided the very different, purely federal, question of whether a class ban, under the circumstances, interferes with a plaintiff's ability to vindicate rights guaranteed by a particular federal statute, such as

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[1] *Ting v. AT&T*, 319 F.3d 1126, 1150 (9th Cir. 2003), *cert. denied*, 540 U.S. 811 (2003).

the Truth in Lending Act or the RICO Act.[2] The outcome of these cases turns on both the nature of the claims at stake and the particular federal statute. *See, e.g., Kristian v. Comcast Corp.*, 446 F.3d 25, 55-61 (1st Cir. 2006) (holding a class ban unenforceable because it interfered with the plaintiffs' ability to vindicate their rights under the Clayton Antitrust Act, but distinguishing other federal statutes). No conflict has yet emerged among these vindication-of-federal-rights cases. In any event, even if a conflict were to emerge, it would not implicate the question presented in this case, which is whether federal law precludes a *state-law* challenge to a class-action ban in a case involving only state-law claims.

One of the cases cited by the petition as evidence of a conflict, *Jenkins v. First Am. Cash Advance of Ga.*, 400 F.3d 868 (11th Cir. 2005), *did* involve a state-law unconscionability challenge to a class ban in an arbitration clause. But far from adopting Athens' preemption theory, *Jenkins* recognized that "[t]he FAA allows state law to invalidate an arbitration agreement, provided the law at issue governs contracts generally and not arbitration agreements specifically." *Id.* at 875. Applying Georgia law, *Jenkins* concluded that there was no substantive unconscionability in that case, particularly given the abil-

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[2] *See Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005); *Carter v. Countrywide Credit Industries, Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Iberia Credit Bureau, Inc. v. Cingular Wireless*, 379 F.3d 159, 174 (5th Cir. 2004); *Livingston v. Assocs. Fin. Inc.*, 339 F.3d 553 (7th Cir. 2003); *Snowden v. Checkpoint Cashing*, 290 F.3d 631 (4th Cir. 2002); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818 (11th Cir. 2001); *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000).

ity of the plaintiffs to recover attorneys' fees. *Id.* at 877-78.

Athens' use of *Jenkins* to suggest that the law of the Eleventh Circuit is somehow in conflict with the decision below is particularly misleading, because the petition omits a more recent and relevant Eleventh Circuit decision that actually decided the question presented. In *Dale*, 498 F.3d 1216, the Eleventh Circuit held that the FAA did *not* preclude the court from finding a class ban unconscionable under Georgia law where the class ban happened to be found in an arbitration agreement. *Dale*'s unconscionability holding was based in part on the extremely limited opportunity of the cable television subscribers in that case to recover attorneys' fees, making it "difficult for a single subscriber to obtain representation" and "allow[ing] Comcast to engage in unchecked market behavior that may be unlawful." *Id.* at 1224.

At bottom, what Athens' petition seeks to do is to transform differing outcomes concerning the enforceability of particular class bans into a conflict of federal law. But no jurisdiction has adopted a categorical rule banning *all* class action bans. The analysis is sensitive to the context and the facts and turns on differences in state law (or, where a federal remedial statute is involved, federal law). Outcomes necessarily differ. *See Muhammad*, 912 A.2d at 24 (striking down class-action ban based on a "fact-sensitive" assessment of unconscionability); *Delta Funding v Harris*, 912 A.2d 104, 115 (N.J. 2006) (explaining in a decision issued the same day that, under *Muhammad*, "a class-arbitration waiver in [an] arbitration agreement is not unconscionable per se," and upholding a waiver in a case involving large individual damages).

Because there is no conflict, this Court has repeatedly denied petitions concerning the question presented in numerous cases, including cases from California state courts and the Ninth Circuit. *See T-Mobile USA v. Laster* (No. 07-976); *Circuit City Stores, Inc. v. Gentry* (No. 07-988), *T-Mobile USA v. Lowden* (07-1330); *T-Mobile USA v. Gatton* (07-1036), and *T-Mobile v. Janda* (07-1331). The Court should do the same here.[3]

Indeed, the question presented is even less certworthy now than it was when the other petitions were denied because the lone decision that had arguably created a conflict, *Gay v. Creditinform*, 511 F.3d 369 (3d Cir. 2007), has been reconciled with the rest of the case law. *See Homa*, 558 F.3d at 229-30 (Third Circuit decision dismissing arguably conflicting language in *Gay* as dicta, and rejecting the notion that *Gay* stood for a "prohibition on unconscionability challenges to class-arbitration provisions").

II. THIS CASE IS A POOR VEHICLE.

Apart from the absence of any conflict, this case is a poor vehicle to explore the question presented. Indeed, Athens has not adequately demonstrated that this Court has jurisdiction over the case.

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[3] Contrary to Athens' suggestion (at 27-28), *Stolt-Nielsen v. Animalfeeds International* (No. 08-1198), currently pending before the Court, has no direct bearing on this case. The question in *Stolt* is whether class arbitration may be appropriate when the contract is silent on that question. Regardless of how the Court decides *Stolt*, however, it will not directly affect FAA preemption of state-law rulings concerning the validity of contract provisions purporting to preclude classwide treatment altogether. Accordingly, there is no reason to hold this case for *Stolt*.

1. The lower court's disposition of the case rested squarely on an independent state-law ground that is unrelated to the question presented. "If the sole problem with Athens's arbitration agreement were the class arbitration waiver," the court explained, "we would direct the trial court to strike the waiver and order the case to arbitration. But the class arbitration waiver is not the only significant problem with the parties' agreement" *Franco v. Athens Disposal Co., Inc.*, 90 Cal. Rptr.3d 539, 555 (Cal. Ct. App. 2009). Because the arbitration clause suffered from the independent defect of precluding Franco from seeking civil penalties on behalf of other employees under the Private Attorney General Act, the court concluded that the agreement as a whole was tainted with illegality and accordingly directed that the case proceed in a court of law. *Id.* at 559.

Given this independent state-law ground, Athens cannot show that a decision on the federal question would necessarily change the disposition below. Because the same judgment could have been rendered by the state court regardless of the answer to the federal question presented, review by this Court "could amount to no more than an advisory opinion" and, accordingly, jurisdiction is lacking. *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945); *see Lynch v. New York*, 293 U.S. 52, 54-55 (1934) (jurisdiction lacking where "the ground independent of a federal question is sufficient in itself to sustain" the judgment).

2. The state court did not even discuss, let alone decide, the federal question presented by Athens' petition. This Court's general practice, under such circumstances, is to assume that jurisdiction is lacking. *See Street v. New York*, 394 U.S. 576, 582 (1969). "[W]hen the highest state court fails or refuses to pass expressly upon a fed-

eral question, the party invoking the Supreme Court's jurisdiction has the high burden of showing that the federal question was in fact properly raised, so that the state court's failure to deal with it was not for want of proper presentation." Gressman, et al., *Supreme Court Practice* 187-88 (9th ed. 2007); *cf. Crowell v. Randell*, 35 U.S. 368, 391 (1836) (Story, J.) ("If both of these [the raising and the deciding] do not appear on the record, the appellate jurisdiction fails.").

To be sure, Athens did present a federal-law argument in the last three pages of its petition to the California Supreme Court, but its treatment of the FAA preemption question was too cursory to satisfy the requirement of proper presentation. Athens Cal. S. Ct. Pet. 27-29; *see Adams v. Robertson*, 520 U.S. 83, 90 (1997). More importantly, Athens' state-court petition did not cite a single case from any court reaching the conclusion it urges here—namely, that the FAA preempts state-law determinations under generally applicable contract law concerning the validity of class-action bans.

In any event, even assuming that the federal question was adequately presented in the state-court petition, the California Supreme Court's general practice is to "decline to decide issues not addressed by the Court of Appeal." *Guz v. Bechtel Nat'l Inc.*, 8 P.3d 1089, 1109 (Cal. 2000). Where the state courts, according to their own practice, would not reach the federal issue under the circumstances, neither should this Court. *See Beck v. Washington*, 369 U.S. 541, 553 (1962); *Bailey v. Anderson*, 326 U.S. 203, 206-07 (1945).

3. Finally, although the question was not explored in the court below, it is unclear whether the FAA even applies to this case. Respondent was employed by Athens as a truck driver, and so his employment contract is ex-

empt from the Act. *See* 9 U.S.C. § 1 (exempting from FAA's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"); *Circuit City v. Adams*, 532 U.S. 105, 119 (2001) (holding that section 1 exempts "contracts of employment of transportation workers" from the FAA); *Harden v. Roadway Package Systems, Inc.*, 249 F.3d 1137, 1140 (9th Cir. 2001) (truck drivers are exempt from FAA). Moreover, even if this Court had jurisdiction and the transportation-worker exemption were not in play, not all of the members of this Court would be able to address the question presented on its merits because the proceedings below were in state court, rather than federal court. *See, e.g., Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (Thomas, J, dissenting) ("I remain of the view that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., does not apply to proceedings in state courts.").

III. ATHENS' FAA PREEMPTION THEORY IS WRONG.

In closing, Athens claims that the decision below runs afoul of this Court's FAA jurisprudence. Pet. 29-32. That assertion, however, merely restates Athens' theory on the merits of the preemption issue—a theory that has thus far attracted no takers.

Indeed, Athens' preemption theory has been carefully considered and uniformly rejected by the state and federal appellate courts in cases such as *Shroyer*, 498 F.3d at 987-93; *Discover Bank*, 113 P.3d at 1110-17; *Scott*, 161 P.3d at 1008-09; *Kinkel*, 857 N.E.2d at 260-63; and *Muhammad*, 912 A.3d at 94-96. These decisions address this Court's cases on FAA preemption (the same cases cited at pages 9-11 and 30-32 of the petition), the FAA's policy of ensuring that arbitration agreements

stand on an equal footing with all other contracts, general principles of express and implied federal preemption, and the generally applicable nature of the state-law contract law alleged to be preempted. Neither Athens' dissatisfaction with the consensus view of state and federal courts, nor its ability to invoke snippets of this Court's cases to support its argument, amount to a conflict warranting certiorari.

As Athens acknowledges, the plain text of the FAA makes arbitration agreements enforceable "save upon such grounds as exist in law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). This Court's cases have consistently explained that the FAA requires that arbitration clauses be placed on an equal footing with all other contracts: "States may regulate contracts, including arbitration clauses, under general contract law principles" but they may not discriminate against arbitration clauses. *Casarotto*, 517 U.S. at 686. "[S]tate law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 491, 492 n.9 (1987) (emphasis in original). However, a "state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport" with the FAA. *Id.*

The courts that have decided the question presented have adhered scrupulously to these principles. *See Shroyer*, 498 F.3d at 990 ("The California Supreme Court in *Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration.") (emphasis in original). As the Washington Supreme Court explained in *Scott*, the FAA "re-

quires us to put arbitration clauses on the *same* footing as other contracts, not make them the special favorites of the law." 161 P.3d at 1008 (emphasis in original). Because the law of states such as Washington, California, Illinois, and New Jersey with respect to exculpatory clauses applies regardless of whether a class-action ban is found in an arbitration agreement or some other contract, it does not run afoul of the FAA: "The arbitration clause is irrelevant to the unconscionability." *Id.* Exculpatory clauses "do not change their character merely because they are found within a clause labeled 'Arbitration'." *Id.*

CONCLUSION

The petition for a writ of certiorari should be denied.

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